IN THE

Supreme Court of the United States

October Term, 1947

No. 6

SILESIAN AMERICAN CORPORATION, Debtor
and SILESIAN HOLDING COMPANY,

Petitioners,

against

TOM C. CLARK, Attorney General, as successor to
The Alien Property Custodian,

Respondent.

BY CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

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The Narrowing of the Issues

As a result of the re-argument of the *Uebersee* and *Silesian-American* cases and of certain concessions by counsel for the Custodian upon oral argument, considerable clarification and narrowing of issues has resulted.

1. *Markham* v. *Cabell* (1945), 326 U. S. 404, sets up the principle that the Trading With Enemy Act relating to World War I and the amendment to §5(b) thereof

by First War Powers Act, 1941, must be read as an "integrated whole" and that sections of the earlier Act unless repealed remain as permanent sections. §9(a) and §8(a) are clearly permanent sections. §9(a) was held to be a permanent section by the express opinion of this Court in the *Cabell* case[1] which holding necessarily made §8(a) a permanent section because for purposes of its applicability the wording of §8(a) is identical with §9(a), and moreover, the exemption of pledged property by Congress was purposeful and §5(a) in no way suggested that §8(a) was to be repealed.

2. §8(a), §9(a) and §5(b) as amended in 1941 can be read together, and applied to both *Uebersee* and *Silesian American.*

If the effect of the 1941 amendment was to broaden the Custodian's power so as to permit the unqualified seizure of property of friendly aliens, the Custodian did not exercise such power in framing the vesting order respecting the Silesian American shares. The order by its express terms vested the shares owned by Non-Ferrum for the benefit of a designated enemy. No reference is made to the rights of the Swiss banks in the shares and the order did not pretend to vest the interests of the Swiss banks. Consequently, if §5(b) authorized the seizure of all alien property, these interests were nevertheless unaffected by the Silesian American vesting order. In this respect the *Silesian American* vesting order (R. 14) was entirely different

[1] In the opinion of the Court by Mr. Justice Douglas it was said at p. 411:

"We can find no indication in the 1941 legislation that Congress by amending §5(b) desired to delete or wholly nullify §9(a)."

from the vesting order in the *Uebersee* case. The *Uebersee* order vested the property because it was found to be property of a foreign national, whereas the *Silesian* order vested the shares of Non-Ferrum because they were determined to be the property of a national of a designated enemy country.

If the Custodian believes that a particular pledge is a cloaking operation, the Custodian under §5(b) may specifically seize the pledged interest and force the pledgee to a proof of non-enemy taint by requiring the pledgee to sue for recovery under §9(a). That, however, was not the situation in the case at bar and was not done with respect to the interest of the Swiss banks.

Thus any additional power granted by §5(b) would satisfy the Custodian's argument that seizure might be necessary to avoid cloaking the enemy interests in the hands of foreign nationals. This power would give protection to American interests and yet not go to the extreme lengths of confiscation of friendly aliens' property without adequate remedy and without some suggestion of enemy taint. In this manner a construction can be given to §5(b) which will not reverse a long established American policy towards its friends and yet give power of seizure where none existed under the 1917 Act.

There is nothing inconsistent in permitting seizure under §5(b) of a pledged interest in foreign national property otherwise protected under §8(a) if such interest be specifically seized, and in allowing the foreign national the right to show freedom from taint or cloaking under §9(a).

3. Whereas, in *Uebersee* the Custodian had the right to seize, the right equally exists to prove that the entire

property interest belongs to friends whom we treat on an equal footing with our citizens. Hence, §5(b) and §9(a) can stand side by side.

4. Congress in the summer of 1946 refused to deprive friendly aliens of their rights under §9(a). The Custodian however in the *Uebersee* case asks this Court to accomplish for him that which Congress was unwilling to do and which Secretary Byrnes urged would be so detrimental to our foreign policy and property negotiations. This action by Congress was peculiarly significant because the Senate Judiciary Committee had the Circuit Court of Appeals opinion in *Silesian-American* before it and expressly rejected the major premise of that opinion.

5. Coming to §8(a), the same reasons which impressed Congress sufficiently in 1917 to make this section relating to pledged property the only exception from seizure in the entire Act must have existed with equal or greater force in 1941. Congress did not repeal §8(a). Nor is there any such irreconcilable conflict as to require judicial repeal.

Judge Hand's reasoning that §8(a) no longer applied was based solely upon his premises that a friendly alien had no rights under §9(a). The continued existence of §9(a) and the affirmance of the *Uebersee* case would give *a fortiori* vitality to §8(a).

5. Applying these principles to *Silesian-American* how do they work in practice? Factually, the corporation being in reorganization and under the supervision of the United States District Court for the Southern District of New York, the record in that court must control. From the Trustee's report and the Vesting Order certain facts are known:

A. The certificates for the shares in question are physically lodged in Switzerland with Swiss banks as pledgees to secure loans (R. 7-28, 45 *seq.*).

B. The equity interest is owned by Non-Ferrum, a Swiss corporation said by the Custodian to be controlled by an enemy (R. 6).

C. Before the war the shares were pledged with the Swiss banks to secure a substantial loan (R. 7, 41, 45 *seq.*).

6. The Vesting Order is directed only against Non-Ferrum. There has been no attempted seizure by the Custodian of the pledge interest of the Swiss banks. Nevertheless when the Custodian seeks to compel Silesian-American to cancel the certificates now held by the Swiss and to issue new certificates to him, he, for all practical purposes, without seizure or vesting or any claim of right, destroys the property held by the Swiss under the guise of taking Non-Ferrum property.

7. If the Custodian believes that the interests of the Swiss banks as pledgees are enemy tainted even though in the name of a friendly foreign national, the Custodian should have vested that interest under §5(b) as amended. The Swiss banks could then come in under §9(a) if they desired and have their rights adjudicated. But the Custodian has made no such seizure or vesting order.

8. The Vesting Order is restricted solely to Non-Ferrum's interest. *Silesian-American* does not dispute the Custodian's right to vest that interest. It does seriously dispute the order of the District Court directing it to satisfy the seizure of Non-Ferrum's interest by action which in effect

accomplishes the destruction or the turning over of the Swiss banks' property. The effect of the order below is to cause to be outstanding two unrestricted and unqualified certificates for the same shares. Cancellation on the stock books cannot prevent the circulation of these duplicate sets of certificates with possible double liability of the issuing corporation, perhaps in a Swiss or other foreign court.

9. Confusion and possible liability to Silesian-American can be avoided by adapting the relief within the provisions of §8(a), §9(a) and §5(b) as amended and regarding the 1917 Act as amended in 1941 as an "integrated whole".

A. Since the interest of Non-Ferrum only has been sought to be vested by the Custodian that interest only should be taken. This could be evidenced by certificates bearing on their face a notation or statement of the pledge interest. Thus two sets of "clean" certificates would not be outstanding at the same time and Silesian-American could never be charged with issuing duplicates in violation of its by-laws and the Stock Transfer Act.

B. If as indicated on oral argument certificates presently in the hands of American pledgees would be exempt from seizure because of §8(a), this Court might well remand the case to the District Court to await the event of seizure (if ever such seizure is made) by the Custodian of the Swiss banks' interest as a foreign national under §5(b). The District Court could then make such an order as to the turning over of the pledge interest as might be appropriate with respect to such interest.

(C) In any event, the holding by the District Court that "whatever may be the interests of the Swiss Banks,

they cannot be considered here" (R. 49) was erroneous, because the provisions of §8(a) required the Court to ascertain the nature of this interest.

10. In taking this position Silesian-American is not espousing the cause of the Swiss banks or Non-Ferrum or any other party. It is in the predicament of having been ordered to do an act which, it believes, is not warranted either by the Vesting Order, by §8(a) or even §5(b) as amended. The issuance of the new certificates as ordered does not appear to be authorized under the law and is plainly inconsistent with the facts.

Silesian-American respectfully requests this Court for the corporation's protection to remand the case to the District Court: (1) to await such action as the custodian may take against the Swiss banks; or (2) to direct the issuance of restricted certificates endorsed so as to give notice as to the existence of this pledge; or (3) to take evidence and determine the nature of the pledge.

The Major Premise in the Opinion of the Court Below Has Been Rejected by Congress and by Subsequent Judicial Determinations

In his opinion below Judge Hand conceded that during World War I by reason of the provisions of §8(a) the Alien Property Custodian did not have power to seize enemy property held by friendly aliens as pledgees with power of sale (R. 67).

In order to arrive at different result with respect to World War II, Judge Hand adopted as his major premise the proposition that a friendly alien could not recover under

§9(a) possession of property seized by the Custodian because of the amendment to §5(b) in 1941 (R. 66 bottom). And such being the case, he concluded that it would be "irrational" to allow a friendly alien pledgee to retain under §8(a) enemy property held in pledge (R. 68 top).

In other words, Judge Hand held that a friendly alien pledgee could not under §8(a) retain possession of enemy property pledged with him for the simple reason that a friendly alien could not under §9(a) successfully recover property seized by the Custodian.

Judge Hand's opinion was handed down July 3, 1946. Shortly thereafter, the Senate Judiciary Committee, with a copy of the opinion before it, refused to approve an amendment to the statute designed to give legislative sanction to the major premise of Judge Hand's opinion, and expressly indicated the belief that the amendment to §5(b) in 1941 had not deprived a friendly alien of the right under §9(a) to recover property seized by the Custodian. This position was approved by the Senate (Petitioners' brief, p. 36) and the House of Representatives acquiesced in this conclusion (Petitioners' brief, p. 37).

Thereafter the Court of Appeals for the District of Columbia in the *Uebersee* case also rejected Judge Hand's major premise that a friendly alien cannot under §9(a) recover possession of seized property.

More recently in the case of *Standard Oil Company et al.* v. *Clark* (as yet unreported,[2]) the Circuit Court of Appeals for the Second Circuit approved the conclusion of Mr. Justice Groner in the *Uebersee* case to the effect that §5(b) as

[2] The pertinent portions of the opinion are set forth at pp. 2-5 of Respondent's Second Supplemental Memorandum in the *Uebersee* case.

amended has not deprived a friendly alien of his right to recover under §9(a) seized property of a non-enemy character. The opinion in the *Standard Oil Company* case was written by Judge Clark, who was a member of the Court which promulgated the opinion of Judge Hand in the *Silesian-American* case.

Not long before the *Standard Oil Company* decision, a similar view had been adopted by the United District Court for the Southern District of New York, in *Swiss Bank Corporation* v. *Clark,* where the opinion was written by Judge Bright. In that case a Swiss bank holding as pledgee shares of a New Jersey corporation sued under §9(a) to have cancelled the duplicate stock certificates that had been issued by the New Jersey corporation to the Custodian on the latter's demand. The Custodian moved for judgment on the pleading. In denying the motion, Judge Bright adopted the view of Mr. Chief Justice Groner in the *Uebersee* case and said that the decision of the Circuit Court of Appeals for the Second Circuit in the *Silesian-American* case was not controlling. The full opinion of Judge Bright may be found in the appendix (pp. 8 *seq.*) to Mr. Connor's Second Supplemental Memorandum for the respondent in the *Uebersee* case.

Prior to the *Standard Oil Company* and *Swiss Bank Corporation* decisions the Yale Law Journal for June 1947 (56 *Yale L. J.* 1068) had examined the opinions in both the *Uebersee* and the *Silesian-American* cases and had concluded at page 1076:

> "The view of section 5(b) and 9(a) adopted in the *Uebersee* case, permitting alien friends to sue for the return of their property, would thus seem to accord more faithfully with legislative intent, constitutional

principles and enlightened self-interest than the interpretation placed on those sections in the *Silesian-American* case."

The Columbia Law Review in its issue for September 1947 (47 *Col., L. R.* 1052) attempted to arrive at a different conclusion but conceded at page 1060:

> "It is true that the policy considerations involved seem to argue on the whole against such a construction [as adopted by Judge Hand]. It has long been American policy to accord alien friends, wherever possible, the same treatment given our own citizens. This policy has been embodied in treaties, one of which, with Switzerland, may have a direct bearing on the *Uebersee* and *Silesian* cases. Undeniably, allowing American citizens the right to recover their property in kind while relegating a non-enemy to a suit for compensation, is discriminatory. Furthermore, Congress in 1946, evidently believing 9(a) to be still available to a non-enemy, twice refused to reamend the act specifically to limit alien friends to a suit for compensation. In addition, a decision now that the alien friend can recover his property in specie would neither disrupt the war effort, nor foreclose Congress from taking over non-enemy property in a future emergency."

The Review endeavord to dispose of these policy considerations by the observation "policy considerations, however weighty, should not be employed to override the mandate of the legislature in a field where the wisdom of its course of action may not be questioned by the judiciary." Thus the learned editor of the Law Review ended by assuming that which he started out to prove, viz., that Congress intended by §5(b) to repeal §9(a) so far as it related to

friendly aliens. He also conveniently ignored the rule frequently enunciated by this court that repeal by implication is not favored (Petitioners' brief, p. 40); that an intent by Congress to violate an important article of a treaty with a foreign power must be clearly and unequivocally manifested (Petitioners' brief, p. 43). Furthermore, on the basis of an uncertain and at best highly ambiguous Congressional enactment he would discard a long-standing principal of American policy whereby no distinction has been made between friendly aliens and American citizens so far as property rights are concerned, and substitute in the place thereof a totalitarian concept whereby friendly aliens become the victims of unnecessary discrimination. Friendly aliens may justly become alarmed at the prospect of having their American properties in an alleged emergency seized by the United States Government and sold to American competitors, with no relief except a right to recover the fair market value of the properties as determined in an expensive and notoriously unsatisfactory proceeding before the Court of Claims.

Respectfully submitted,

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